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IN THE
Supreme Court of the United States

DAVID PAUL HAMMER, PETITIONER,

v.

JOHN D. ASHCROFT, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF *AMICI CURIAE* OF THE JOHN HOWARD ASSOCIATION OF ILLINOIS, THE NATIONAL POLICE ACCOUNTABILITY PROJECT AND THE UPTOWN PEOPLE'S LAW CENTER IN SUPPORT OF PETITIONER

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Interest of Amici[1]

The John Howard Association of Illinois

The John Howard Association of Illinois has an over 100-year history of monitoring prisons in Illinois, advocating for the fair and effective treatment of prisoners and for sentencing reform that serves the dual purposes of punishment and rehabilitation.

This case concerns an issue of interest to our organization and the other *amici* as it addresses a prisoner's ability to inform the public, policymakers and corrections official of prison abuses and valuable information helpful in implementing better corrections and sentencing policy, and potentially inform us of ways to prevent crime from occurring in the future.

The National Police Accountability Project

The National Police Accountability Project (NPAP) was founded in 1999 by members of the National Lawyers Guild (NLG) to combat misconduct by police officers, prison guards and other law enforcement officers. The project presently has more

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[1] Pursuant to Supreme Court Rule 37, counsel for the *amicus curiae* declares that she has authored this brief in total with no assistance from the parties; that no individuals or organizations other than the *amici* made a monetary contribution to the preparation and submission of this brief; that counsel for all parties were given timely notice of the intent to file this brief ; and that written consent of all parties to the filing of the brief *amicus curiae* has been filed with the Clerk.

than four hundred attorney members throughout the United States. NPAP provides training and support for attorneys and other legal workers, public education and information on issues related to misconduct and accountability, and resources for non-profit organizations and community groups involved with victims of law enforcement misconduct. NPAP also supports legislative efforts aimed at increasing accountability, and appears as *amicus curiae* in cases, such as this one, which present issues of particular importance for lawyers who represent plaintiffs in law enforcement misconduct actions.

The Uptown People's Law Center

The Uptown People's Law Center ("UPLC") is a not-for-profit legal services center serving poor and working people in Chicago, Illinois. In addition to its legal work for community residents, UPLC represents prisoners in challenges to prison conditions, the parole system, and a variety of other matters. UPLC receives over 5,000 requests for representation every year, and has one of the largest dockets of prison cases in Illinois. UPLC files cases, and provides advice to prisoners litigating their own cases, in both federal and state courts. UPLC has a vital interest in ensuring that prisoners retain access to the press to expose the unlawful conduct of prison officials. UPLC has regularly challenged restrictions on prisoners' communications with those outside prison, including the press.

Summary of Argument

Prisoners lose myriad rights when they are incarcerated. But they don't lose all of them. They should not lose the right to talk to the press simply because a government official has an objection to the content of the prisoner's speech, and has a desire to suppress the message the prisoner wishes to convey.

Yet, the decision below makes it impossible for reporters to conduct face-to-face interviews with federal death row inmates simply because of the mere potential that the prisoner may say something the government finds offensive. It also forbids federal death row prisoners from communicating to the media any information about other prisoners. This is the epitome of censorship on free speech which impinges on a prisoner's first amendment rights. At best, the policy in question, and the decision below are overly broad and restrict not only potentially harmful speech, but also potentially helpful speech. At worst, the policy and decision below unconstitutionally muzzle prisoners on the basis of one condemned terrorist's actions. It is yet another example of an over inclusive government policy based upon the worst case.

This restriction severely curtails the media from being able to investigate abuses or miscarriages of justice on death row. It also inhibits transparency into a billion dollar taxpayer expenditure. The policy and decision below ignore the recommendation of the national Commission on Safety and Abuse in America's prisons which recommends that press

access be allowed in prisons specifically for the purposes of transparency and oversight.

Finally, the policy and opinion below assume that all prisoners on the federal death row are incorrigible, or likely to say things the government finds offensive. Muzzling free speech because the speech could be unfavorable limits the possibilities for prisoners to contribute useful information to the public, victims, law enforcement or policymakers.

The rationale for limiting the speech is not based on a legitimate penological interest, but rather on an opinion that the language could potentially be offensive. This is not constitutionally permissible. For these reasons, *amici* respectfully request that this Court grant David Hammer's Petition for Certiorari.

Argument

I. Prisoners' access to media is essential to uncovering instances of prisoner abuse, mistreatment and other miscarriages of justice.

Prisoner access to media is a critical component of ensuring prison safety and revealing prison and prisoner abuses, poor treatment in prison and miscarriages of justice. Some of the most notorious prison abuses have come to light because government officials permitted reporters to visit and interview prisoners at institutions[2]. Indeed, many positive prison reform initiatives result from news reports about prison abuses[3].

It is well-settled that prisoners may lose some of their constitutional rights simply by virtue of their imprisonment. *Turner v. Safely*, 482 U.S. 78, 89 (1987). However, this Court has held that any prison rule that restricts a prisoner's constitutional rights must be "reasonably related to legitimate penological interests." *Id.* at 84-85. The policy at issue in this case prohibits federal death row prisoners from

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[2] Loretta Tofani, *Terror Behind Bars: Most Victims of the Sexual Attacks are Legally Innocent*, THE WASHINGTON POST, Sept. 26, 1982; Loretta Tofani, *Improved Conditions Reduce Assaults in P.G. Jail*, THE WASHINGTON POST, Dec. 31, 1982; Loretta Tofani and Tom Vesey, *Seven are Indicted in Sexual Assaults at Prince George's Jail*, THE WASHINGTON POST, Jan. 14, 1983.

[3] Ken Armstrong and Steve Mills, *The Failure of the Death Penalty in Illinois*, November 14-18, 2009, THE CHICAGO TRIBUNE; Gary Marx, *Inmate Death Triggers Reform*, THE CHICAGO TRIBUNE, August 28, 2009.

having face-to-face interviews with the press and from communicating to the press, in writing, in person or on the phone, any information about another inmate. The motivation for the policy is to mute free speech the government might find offensive. This is an unconstitutional abridgement of inmates' First Amendment rights.

Two issues are of concern. The first is the policy that forbids prisoners from talking about any other prisoners to a member of the press. It is true that this Court has in the past upheld restrictions on an inmate's ability to communicate with the media. *Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974), *Pell v. Procunier*, 417 U.S. 817 (1974). But in those instances, other, alternative means of communicating with the media were available to the prisoners.

Here, the rule forbidding prisoners to talk to the press about another inmate provides no uncensored way for prisoners to convey information to the press. As Judge Easterbrook noted below, " [a] system of rules that permitted prison administrators to conceal beatings of starvation of prisoners, violations of statutes and regulations and other misconduct would be intolerable." (See App. A 13a)[4] Yet, in this case, the rules create exactly that situation for federal death-row inmates.

Although Judge Easterbrook stated below that "as far we can tell, this rule applies to interviews (in

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[4] All citations ending in "a" are to the Appendix filed by Petitioner.

person or by telephone) but not to correspondence," Judges Rovner and Wood note in their separate dissents, that the government conceded that "death-row inmates are not allowed – through any method of communication to discuss other inmates with members of the media." (See App., 13a, 19a-20a) Thus, the current policy creates exactly the "intolerable" system of rules Judge Easterbrook described. Inmates have no way of communicating anything about another inmate, even allegations of prison abuse, to the media.

The second issue of concern is the policy prohibiting face-to-face interviews with federal death row prisoners and the press. Face-to-face interviews with media provide reporters with an opportunity to observe a prisoner who may allege an injury or deficiency in medical care and also enable reporters to develop relationships where they can better determine a prisoner's credibility.

In 2005, for example, Wall Street Journal Reporter Gary Fields, visited Gerald Johnson, a terminally ill prisoner at the Menard Correctional Center in Illinois for a story about the growing population of terminally ill prisoners. He opened the story by describing what he saw when he visited Mr. Johnson, stating:

> Gerald Johnson rests on a wooden desk that he built when he was stronger. His piercing eyes -- the color of his prison-issue blue shirt -- are one of the few reminders of the young criminal incarcerated in 1977 for participating in the murder of a prison guard. His cheeks

> are sunken and Mr. Johnson's bald head gives his 128-pound frame a gnome-like appearance. White gauze, spotted with blood, is taped to his forearm where an intravenous tube delivers chemicals to fight the cancer in his throat." Gary Fields, *Terminally Ill Raises Tough Questions*, THE WALL STREET JOURNAL, September 29, 2005.

This reporter was able to convey a much more accurate description of the prisoner and his medical condition than he would have if he and Mr. Johnson had simply corresponded through the mail or the telephone.

And in 1999, the Chicago Tribune published an investigative series about how the death penalty was administered in Illinois[5]. The reporters corresponded with and visited with several condemned inmates, and uncovered stories of horrific police and prosecutorial misconduct resulting in several wrongful convictions. The series ultimately led to a statewide moratorium on executions and 17 exonerations. The state legislature responded by enacting meaningful reforms[6].

The face-to-face visit is also important for prisoners who may find it difficult to talk about any abuse they suffer in prison. Earlier this year, the

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[5] Ken Armstrong and Steve Mills, *The Failure of the Death Penalty in Illinois*, THE CHICAGO TRIBUNE, November 14 – 18, 2009.

[6] Jodi Wilgoren, *Panel in Illinois Seeks to Reform Death Sentence*, THE NEW YORK TIMES, April 15, 2002.

Department of Justice Office of the Inspector General issued a report on sexual abuse in prisons[7]. Like many states, the Federal government recognizes in cases of custodial sexual misconduct, "consent by a prisoner is never a legal defense because of the inherently unequal positions of prisoners and correctional and law enforcement staff who control many aspects of prisoners' lives." *The Department of Justice's Efforts to Prevent Staff Sexual Abuse of Federal Inmates*, September 2009, Report Number I-2009-004, at page 1.

Thus, the inherent relationship between prisoners and officers or other prison staff is one which makes it difficult for prisoners, who are by definition subordinate, to communicate abuses to others. It is even less likely that a prisoner would communicate evidence or information of abuse through the mail subject to review by the alleged abusers, or through a phone call monitored by the alleged abusers. It is only in a face-to-face communication where the fear of someone intercepting the message is alleviated.

In addition, face-to-face meetings engender trust and enable reporters to better determine credibility by observing eye contact, listening for intonation and observing body language. Trust is particularly important in situations of abuse generally, but even more so in situations of abuse

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[7] The Department of Justice's Efforts to Prevent Staff Sexual Abuse of Federal Inmates, September 2009 Report Number I-2009-004, available at http://www.justice.gov/oig/reports/plus/e0904.pdf

where the abuser remains in control of everything, including communication.

II. A national, bi-partisan commission charged with studying safety and abuse in America's prisons finds press access to prisoners a key recommendation for preventing prisoner abuse and enhancing prison safety.

In 2006, a bi-partisan group of judges, lawyers, policymakers, law enforcement officials, professionals, and advocates created the National Commission on Safety and Abuse in America's Prisons (The Commission)[8]. The Commission's sole task was to investigate, over the course of a year, and through public hearings, safety and abuse in American prisons. It held four hearings in different parts of the nation, one of which focused exclusively on the issues of accountability, oversight and transparency.

The Commission's report made several findings. Key amongst them was the need for transparency, oversight and accountability in the prisons. Specifically, the report recommends that governments should "strive for transparency" and "[e]nsure media access to facilities, to prisoners, and to correctional data." *Confronting Confinement: A Report on Safety and Abuse in America's Prisons,* p.16. In support, the Commissioners write that,

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[8] John J. Gibbons and Nicholas de B. Katzenbach, *Confronting Confinement: A Report of the Commission on Safety and Abuse in America's Prisons*, June 2006 (available at www.prisoncommission.org)

"...every prison and jail should allow the press to do its job." *Id.* The current BOP policy instituted by then-Attorney General Ashcroft ignores this recommendation. Instead, it expressly inhibits a prisoner's ability to report abuse of prisoners by other prisoners or officers.

In fact, the current policy makes it impossible for a member of the press to observe a federal death row prisoner at all. Personal observation is critical to describing circumstances and conveying a story to the public. It is also essential to describing injuries. It is, after all, one thing to receive a letter from a prisoner complaining of a beating. It is quite another to actually observe whether any injuries exist and document what they look like.

Furthermore, incarceration takes a toll on inmate relationships with family and friends who could otherwise be advocates in instances of abuse, poor treatment or miscarriages of justice. In some instances, prisoners do not have any friends and family on whom to rely.

Because of the remoteness of prisons, families and friends of prisoners, especially those with long or terminal sentences, are less likely to visit. The remoteness is only exacerbated by the fact that the vast majority of prisoners and their families are impoverished, and thus unlikely to keep in touch via the telephone. It is axiomatic that visits from family and friends, and on occasion, attorneys and journalists, actually contribute to a safer prison environment. Thus, the lack of social interaction for

prisoners in remote locations enhances the need for transparency and oversight.

Finally, a great percentage of prisoners come to prison with little or no education. They may thus be inhibited from communicating effectively any complaints of abuse in writing, and perhaps even through a 15-minute phone conversation.

III. The current policy expressly suppresses speech based on anticipated offensive content, and is over inclusive. The policy and the decision below also assume that the prisoners who sit on the federal death row are both the most "incorrigible" prisoners and are most likely to espouse statements through the press that glorify their criminal status.

In the decision below, judge Easterbrook states that "[i]t is easier to justify limiting press contacts at the few places holding the most incorrigible prisoners (USP Florence and the Special Confinement Unit at Terra Haute) than at all medium- and maximum-security prisons." (See App., 5a) Yet, this assumption is flawed. Prisoners housed on Federal Death Row are at the Special Confinement Unit because that is where the BOP has designated the condemned unit will be. They are housed there regardless of their behavior. The fact that they have committed crimes for which they were sentenced to death is separate from an assessment of their prison behavioral record. Mere placement at the SCU because one is a death row inmate is not indicative of the security threat posed by any particular inmate. Corrections experts agree

that some prisoners who have committed the most egregious crimes can be the most well-behaved prisoners, and vice versa[9].

Secondly, the policy is over inclusive, and assumes that Timothy McVeigh's behavior, which was the impetus for then-Attorney General Ashcroft's policy announcement, is indicative of all death row prisoners' behavior. This is not the case. As is noted in the decision below, Hammer wishes to have access to the media to discuss prison conditions and other issues, but not to promote murder.

But even if it was the case that death row prisoners wanted to say something the government deems offensive, instituting a policy that would prohibit them from saying something on the basis that it would be offensive, is not constitutional. Our First Amendment is the hallmark of our freedom and guarantees even those who have ugly things to say the right to say them. Prison administrators can only curtail free speech if the motivation behind it is reasonably related to a legitimate penological interest. *Turner,* 482 U.S. at 84-85. As Judge Rovner stated in the decision below, "[s]uppressing speech because government officials find the content offensive is not a legitimate penological interest." (See App. 15a) This court has wisely given great deference to prison officials, who possess a unique expertise in how to handle prisoners and maintain safe and secure prisons. *Procunier v. Martinez*, 416 U.S. 396, 405-406 (1974); *Turner*, 482 U.S. at 84-85.

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[9] Ira J. Silverman, *Corrections, a Comprehensive View*, Second Edition, 2001, p. 147.

In this case, however, the right the government seeks to abridge is based on content, a rationale this Court should not accept.

IV. The current policy cuts off valuable communication that can be used to inform people invested in justice with information about why people commit certain crimes and what, if anything, works to rehabilitate people. Crime prevention.

The reason behind the ban in the current policy is that terrorists or serial killers should not be allowed a podium in which to express their beliefs, beliefs many of us may find offensive. This Court's jurisprudence reveals a strong adherence to knocking down government censorship of free speech based solely on content. In this case, the censorship is even more egregious because it could prevent prisoners from articulating serious prison abuses. However, another important policy reason to find the ban unconstitutional should inform the court.

While it may be true that in some cases, prisoners enjoy celebrity-style media attention, it is equally true that in other cases, prisoners may have something constructive to offer. They may have something to offer victims, social scientists and law enforcement officials that help inform us about what leads one to commit heinous, atrocious acts. They may provide some semblance of closure for victims through the media, in a way they are not otherwise able to. For example, a prisoner might express to a reporter that he or she is remorseful and express

some explanation for his actions but be prohibited from directly contacting the victim or victim's family.

Victims families have expressed a desire to hear from those who cause them and their families harm. In November 2009, John Allen Muhammad, better known as the DC Sniper, was executed without ever saying a word to the media about his crimes. He did not seek out media interviews, and he said nothing immediately preceding his execution. Some of the victims' family members noted their disappointment that Mr. Muhammad died quietly, lamenting that he never took responsibility, explained why he killed or showed remorse. Dena Potter, *Silent DC Sniper Mastermind Muhammad Executed*, THE CHARLOTTE OBSERVER, November 10, 2009.

Media access to prisoners may also better inform policymakers and the public about how to implement more effective laws. Perhaps it is the public's best interest to have a greater understanding of why people commit crimes. It is well-accepted that after time, prisoners go through a sort of "criminal menopause" in which they mature and reflect on their actions. They are often helpful in explaining what lead them to make the choices they made. By curtailing their ability to speak based upon a fear that all prisoners may say something a government official finds offensive limits prisoners from providing us with helpful information.

Conclusion

Prison abuse is a serious issue. Access to the press can be critical to revealing prison abuses, miscarriages of justice and other types of mistreatment of prisoners. The sheer nature of prisons – banishment to a place out of sight and out of mind, and prioritizing security, make transparency more difficult. But it is no less important.

Reporters are in a unique position to ask prisoners, "why?" They are disinterested advocates of information. The stories journalists ultimately produce arm the public, policymakers, law enforcement officials and the judiciary with information which guides us in administering justice and informing the public. The ability to physically observe someone is critical to gauging credibility, observing features to convey the story better and provide oversight of the prison environment.

Perhaps most importantly, prisoners should not be muzzled because the government dislikes what they may say. Absent a reasonable relation to a legitimate penological interest, this Court cannot allow Hammer's first amendment rights, or those of other death row inmates, to be abridged because of the content of their speech.

Therefore, *amici* respectfully request that the Court accept review of the decision below.

Respectfully submitted,

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